United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7346

To be argued by
GEORGE F. CHANDLER III

United States Court of Appeals

FOR THE SECOND CIRCUIT

TRADAX LIMITED; NITROVIT LIMITED; JOSEPH RANK LTD.; REASON & BUSBY LTD.; T. D. BAILEY LTD.; HUDSON WARD & CO. LTD.; BARKER, LEE, SMITH LTD.; WHITTENS LTD.; GENERAL FREIGHT CO. LTD., and BOCM SILCOCK LTD.,

Plaintiffs-Appellants,

against

M.V. "HOLENDRECHT", her engines, boilers, tackle, etc.,

and against

N. V. STOOMVAART MAATSCHAPPIJ DE MAAS and PHS. VAN OMMEREN, N. V.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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POINT I

The order of the Court below was final and appealable since this is a civil action with admiralty as the basis for civil jurisdiction.

The complaint stated, as the basis for jurisdiction, that:

> "1. This is a case of contract, cargo damage and non delivery of cargo, *civil and maritime,* and is an admiralty and maritime claim within the meaning of Rule 9 (h). Plaintiffs invoke the maritime procedures specified in Rule 9 (h)." (p. A4) (Emphasis added.)

The case number assigned was 75 Civ. 3173 (p. A1), a civil action. This Court held in *Compania Espanola* v. *Nereus Shipping, S.A.,* 527 F. 2d 966 (2 Cir. 1975), that:

> "All Nereus is saying is that the order of December 18, 1974, was interlocutory and not final, and also that it denied an injunction in an admiralty case, that an admiralty court had no power to issue injunctions and that the principle of *Enelow* v. *New York Life Insurance Co.,* 293 U.S. 379 (1935) should be applied. All this is nonsense. The order was final, and is thus appealable. *Paliaga* v. *Luckenbach S.S. Co.,* 1962 AMC 1632, 301 F. 2d 403 (2 Cir., 1962). See also 28 U.S. Code, sec. 2201; *American Casualty Co. of Reading, Pa.* v. *Howard,* 173 F. 2d 924 (4 Cir., 1949). This is not a suit in admiralty nor is the principle of *Enelow* concerning stays in admiralty even remotely applicable. The reference in the complaint to the maritime law and admiralty is to indicate the basis for the civil jurisdiction of the District Court, there being no diversity. *This is a civil action and the papers in the file are given the Case No. 74 Civ. 5102.* In the motion

papers Nereus makes no reference to this number. We deny the motion to dismiss as frivolous." 527 F. 2d at 972. (Emphasis added.)

No motion to contest jurisdiction was made by defendants-appellees. The issue of jurisdiction is first raised in their brief, citing *Lowry & Co., Inc.* v. *S.S. Le Moyne D'Iberville,* 372 F. 2d 123 (2 Cir. 1967). The *Lowry* case had been initiated on the Admiralty side of the Court, prior to the enclosure of Admiralty within the Civil side of the Court. The case number assigned to the *Lowry* case was 64 Ad. 1362.

The opposing brief also cites *Bernado Penoro* v. *Rederi A/B Disa,* 376 F. 2d 125 (2 Cir. 1967). This case is easily distinguished by the fact that the main action was a personal injury action by a longshoreman, while the arbitration concerned third parties to the suit. A stay of the impleader action did not affect the substantial rights of the parties, inasmuch as it primarily concerned an action in indemnity.

This appeal does concern substantial rights of the parties. If this appeal is dismissed for jurisdictional reasons and arbitration, as framed by the Court below, goes forward, the appeal will certainly be reinstituted after arbitration regardless of the outcome of the arbitration. This is because of the impossibility of proceeding in arbitration with the two defendants under a charter which is not binding on them. The arbitration would be a useless act causing unnecessary expense and delay. It is as if a party defendant, such as a stevedore, had mistakenly been included in an order to stay proceedings while arbitration proceeded. This Court should intervene to correct such an obvious error, as it should do here, since it would be harmful to plaintiff to stay the action, while awaiting the outcome of an arbitration that does not concern their rights as to the wrongfully included parties in the stay.

As was stated in *Compania Espanola* v. *Nereus Shipping, S.A.*, supra:

> "It is also claimed by Hideca that the order of consolidation is not appealable. But inasmuch as the order is conclusive on the issue of the obligation of the parties to arbitrate and how they are to arbitrate, and has a final and irreparable effect on the rights of the parties, it is appealable. The order not only mandated the procedural step of consolidation, it also obligated the parties to arbitrate, thereby affecting their substantive rights. *We hold this order appealable. It finally adjudicated claims of right separable from, and collateral to, the rights that will be determined by the arbitrators. Those claims of right are too important to be denied review and too independent of the cause itself to preclude the parties from seeking appellate review until the arbitration is concluded.*" 327 F. 2d at 973. (Emphasis added.)

This appeal concerns an important and novel question of law which, if addressed by this Court, is certain to effect arbitrations in the future no matter which side prevails. There also appears to be a conflict among the Judges in the District Court. The issue must be met now.

POINT II

Defendants-Appellees have no right to demand arbitration with Plaintiffs-Appellants.

Defendants-Appellees attempt to distinguish the clause in the S.S. NAASHI case (*Amstar Corp.* v. *Vasalem Shipping Corp.*, 75 Civ. 4895) from the clause in this matter by saying that "All terms . . . to be considered as fully incorporated herein", the clause in this matter, is much stronger than "subject to all the terms . . .". This is a classic case of distinction without difference. Either clause has ex-

actly the same effect—it binds the holders of the bills of lading to the referenced charter ("those who subsequently consent to be bound by its terms"—*Lowry & Co.* v. *S. S. Le Moyne D'Iberville*, 253 F. Supp. 396). Certainly either clause is broad enough to incorporate arbitration within the bill of lading, but with whom? Defendants-Appellees claim they are parties through the bills of lading, which were signed on behalf of the Master. If the bills of lading contained a clause admitting liability for any cargo loss, it would be a certainty that defendants-appellees would claim *not* to be bound by its terms. In any event, they must accept all the terms of the bills of lading and the charter parties referenced, including the warranty of seaworthiness and loading, if they accept the bill of lading terms. They disclaim such warranties and claim to be only party to the bill of lading—such that they can have their cake and eat it too. Without the warranties of the charter referenced, there is no means to determine liability other than the U.S. Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315. In effect, this would force arbitrators to interpret the substantive U.S. Law. (Of course, this is one of the problems that will prevent English arbitrators from deciding the matter.)

The bills of lading make the vessel owner liable in personam, but not necessarily for all its terms. The signing of the bills of lading on behalf of the Master is not subsequent consent to an arbitration. Certainly defendants-appellees were not original parties to the sub-charter. Thus there is no means by which plaintiffs-appellants could have compelled defendants to arbitrate thus in equity, the opposite should hold true.

If this Court allows arbitration to be had in this matter, it should only be with the clear understanding that such a situation in the future will give bill of lading holders the right to demand arbitration of any party bound to the bill of lading.

POINT III

A party to the suit not a party to any contract of carriage cannot compel arbitration.

Defendants-Appellees attempt to confuse and distort this issue. Both defendants can't be the owners *and* operators. They claim to be both and take advantage of the obvious procedural windfall. However, only one is listed as the owner in any of the respected maritime publications, such as Lloyd's Register. As with many steamship companies a corporation has been set up to own the vessel, while the corporation owning that corporation manages and crews the vessel. These corporations should not be allowed to slip in and out of their corporate identities to suit their own needs, while hampering valid claims of others.

N.V. Stoomvaart Maatschappij De Maas holds itself out to the world as the owner of the M.V. HOLENDRECHT. Now PHS Van Ammeren, N.V. says it too is the owner. If defendants-appellees had been kind enough to provide the head charter dated December 14, 1972, we could see which entity claimed to be the owner in that document. This is presumably why the head charter was not included as an exhibit in the moving papers. (Plaintiffs had noticed the production of this charter as well as various other documents, but discovery was cut off by the motion.)

The affidavit in opposition to the motion raises this issue of the separability of the defendants-appellees, and the confusion created by the attempt brings the two defendants together. We are expected to accept the unproven premise that this vessel was owned and operated by committee.

Since defendants-appellees choose not to present any documentation to support their allegation of joint ownership and operation, when such documentation was readily

available to them, the inference must be drawn that such documentation would show the contrary.

One of the defendants is a stranger to all of the contracts of carriage. It would be a gross miscarriage to allow such defendant to avoid the suit in favor of an arbitration which can make no finding with respect to such a defendant (see *American Renaissance Lines* v. *Saxis SS Co.*, 502 F. 2d 674).

POINT IV

The arbitration clause has expired and no interpretation of the arbitrators can revive it.

The case cited by defendants-appellees only show that there is a dispute among the District Court Judges of how to dispose of this issue. The clause has a very plain meaning and does not require interpretation. The arbitrators certainly could decide laches or the timeliness or adequacy of notice of claim, but this issue is quite beyond those determinations.

CONCLUSION

The order determines substantial rights and is appealable. The order is in error and should be reversed.

Respectfully submitted,

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